IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

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NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

v.

DOROTHEA T. FRANK,
Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR REHEARING

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I

Appellant has unduly magnified the scope of the question presented by this appeal and the effect of the decision. The question presented relates to the applicability of Section 20a of the Interstate Commerce Act to the debts and liabilities which by virtue of State statutes attach to a consolidated interstate carrier whose consolidation was effected under such State statutes at a time when they had not been superseded by Federal enactment. As regards

future consolidations, or consolidation effected under paragraph (4) of Section 5 of the Interstate Commerce Act as amended by the Act of June 16, 1933, the question is not here, was not determined, and need not be considered.

Appellant asserts that "any consolidation approved by the Commission under Section 5 can only be effected under State Consolidation Statutes * * *" (Petition for Rehearing, bottom of page 2). Clearly, Appellant is in error. The *Snyder* case held that Section 5 had not yet become applicable to such consolidations. The Commission had not adopted its complete plan of unification. Therefore, consolidations were still to be effected under applicable State statutes.

Thereafter Congress amended Section 5. Under the 1933 Act consolidations were to be in harmony with the tentative plan (Sec. 5, par. 4b). The tentative plan already had been adopted. Thus, consolidations of interstate carriers could no longer be had under State statutes, except in so far as such State statutes provide the mechanics therefor.

II

Appellant's position in seeking shelter behind Section 20a is unconscionable. Under that section the proceedings before the Commission are set in motion and the Commission acts "upon application by the carrier". Unless the carrier applies the Commission can make no order authorizing the assumption of obligation or liability. If then such authorization was necessary, it was at least incumbent upon the Appellant to make such application, and if thereupon the Commission refused to authorize such assumption, then Appellant would be justified in asserting such refusal as a defense; but it cannot have been intended that Appellant might be deliberately omitting to make such application, claim immunity from discharging the debts and liabilities of its constituent corporations; nor did it claim such immunity when without specific authorization

it made interest payments on the Northern Ohio coupons and on the mortgage bonds of its constituents.

Appellant ought not to be heard on an application for rehearing until it has first endeavored to set to rights a state of confusion created by its own conduct. It is submitted that fair dealing and good faith should require Appellant first to make application to the Interstate Commerce Commission before coming here with a petition for a rehearing.

In 1923 Appellant obtained an authorization from the Interstate Commerce Commission to operate the lines of the constituent companies and to issue the stock of the new company in exchange for the stock of the constituent companies. It clearly appears from the Commission's report that the Commission conceived its function as supplementing and facilitating consolidations which were still to be effected under State law. Applicable State laws provided that the obligations of the constituent companies should attach to the consolidated company. Appellant, now disputing that obligations so attach, in effect, holds that the Commission's own conception of its jurisdiction was erroneous. Appellant would retain the benefits of an authorization obtained under what it holds to be an erroneous conception of the Commission's function without first attempting to set the matter to rights before the Commission itself.

The Commission, in authorizing the proposed stock issue of the new company, must have taken into account the security obligations ahead of that stock, which obligations included the securities here in suit. In two later cases the Commission spoke of this Appellant having assumed these obligations (*Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 [1924], and *Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645).

Assuming that the Commission could make a valid order authorizing a consolidation without the attachment of the security obligations of the constituent companies, it is

most unlikely that the Commission would ever have granted such an application. Rather, they would have insisted that application be made that these obligations should attach to the new corporation as a condition of authorizing a consolidation of the properties. This matter could and should be set to rights by a new application made to the Commission at this time. Appellant is the only person who could make such an application. Appellee has no status to set the Commission in motion. Appellant should not be heard to petition for a rehearing because of a claimed confusion for which it is itself responsible, and which confusion it itself could set to rights by an appropriate application made to the Commission at this time.

III

The circumstances that this affirmance was by an equally divided court would appear to be no reason for ordering a rehearing before a full bench.

Brown v. *Aspden's Administrators*, 14 How. 25.

Since Appellant concedes that this decision by a divided court determines the law only as between the immediate parties, the court may not be concerned with the Appellant's solicitude with regard to other pending litigation.

IV

The petition for rehearing should be denied.

Respectfully submitted,

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